Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR REHEARING OF ORDER VACATING JUDGMENT AND FOR OTHER RELIEF

Edward L. Genn
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November 20, 1980

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Petitioner Eugene Johnson III, by and through counsel, petitions this Court for a rehearing and or setting aside of the Order of the Court dated Monday, November 17, vacating the judgment herein and remanding

the cause to the District of Columbia Court of Appeals, and for leave to file the attached Response, on the following grounds:

1. A copy of the Order which forms the basis of this Petition is appended herein as Petition for Rehearing Exhibit 1. It was entered on Monday, November 17, 1980.

2. This Court granted the Writ to the Petitioner on October 6. Three weeks later on October 27, the Respondent filed a Motion to Dismiss stating the case should be vacated on the ground that, as the Motion originally stated, "Respondent desires to consent to the vacating of the decree by the Trial Court." (Motion, p. 1). The original Motion lacked any authorities or clear ground other than its statement that the Respondent would consent to the vacating of the Order. He did not say he no longer desired to adopt the children but instead, carefully addressed only the vacating of the order;

nor did he confess error; nor make any other assurances beyond a unilateral promise.

3. The Opposition was timely filed within 10 days and sought to address what were perceived as the legal issues as well as the facts asserted.

4. On the day before this matter was presented to this Court, that is, November 13, in the late afternoon, a Reply was submitted by the Respondent in which he dealt with the Opposition's points and authorities and added a further statement from counsel that he would not seek an adoption. This Reply was left at counsel's office in his absence. A call was made to the Clerk of this Court the following morning with a message that an objection and further pleading would be filed. It was indicated by the Clerk that the matter was then being considered by this Court.

5. New matters appear in the Reply which were not in the original Motion. They were considered by this Court in its November 17, 1980 Order, without any opportunity for reply or response by Petitioner.*

6. It is by no means clear that Respondent was entitled to make a Reply at all in this circumstance. If so, however, either that Reply should not have been considered as a basis for the Order because of its new matter, or some fair opportunity to respond should have been given. In fact, the Reply of November 13 is really the original Motion.

7. We attempted to provide that response over the weekend. We prepared it with the expectation of either its direct filing or a filing a Motion for leave to submit it. By the time the Response was brought to the Court before noon, this

*An opportunity to be heard, meaningfully, at a meaningful time, is fundamental. Cf. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Court had already ruled. The Response is attached as Petition for Rehearing Exhibit 2. Its filing is moved.

8. It is respectfully suggested that in view of the Court's consideration of the matters in the Reply and their additional elements, cases and representations, this Court should either vacate its November 17 Order or grant a Petition for Rehearing and entertain consideration of the Response.

9. What is not addressed by the current Order is the matter of the public importance of the issues as to which the writ was granted, the irrevocable loss of the relationship that has occurred, and the future effects of the statute. Although this Court's current Order has vacated the judgment of the District of Columbia Court of Appeals and it has not dismissed the matter on mootness grounds, the practical effect appears the same. It allowed a filing at

the last minute with case law and stipulations that it considered and it directed the Court of Appeals to consider, in circumstances where neither should be done.

10. It has indirectly granted Respondent a unilateral right to impair ongoing constitutional rights while the matter pends, allowing him further unlimited delay.

11. It has been noted in the Response and in this record that similar promises and assurances have been given in the past when consent orders were entered into, and they have not been complied with.

12. This Court's action was premature and failed to consider fully either the public interest in the matter --- which is the only pertinent question when mootness per se is removed --- or the record.

13. The Reply raises not insignificant mootness issues in causes before this Court.

We suggest and move that leave to file the attached Response be granted, the Petition be granted and/or the Order of November 17 vacated with the cause calendared for briefing and oral argument on the merits.

Respectfully submitted,

/s/

Edward L. Genn
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(202) 638-2027
Attorney for Petitioner

Certificate under Rule 51

Counsel certifies that this Petition is presented in good faith and not for the purpose of delay.

/s/

Edward L. Genn
Counsel for Petitioner

PETITION FOR REHEARING
EXHIBIT I

Order of This Court of November 17, 1980

"The judgment is vacated and the case is remanded to the District of Columbia Court of Appeals for further consideration in light of the position presently asserted by the respondent in his motion to dismiss filed October 27, 1980, the opposition filed thereto by petitioner on November 6, 1980 and the reply filed thereto by respondent on November 13, 1980."

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CERTIFICATE OF SERVICE OF
PETITION FOR REHEARING OF ORDER
VACATING JUDGMENT AND FOR OTHER RELIEF

I HEREBY CERTIFY that three copies of the foregoing "Petition for Rehearing of Order Vacating Judgment and For Other Relief" were mailed, first class prepaid, to Hal Witt, Esquire, 1620 Eye Street, N.W., Washington, D.C. 20006, attorney for Respondent, this 26 day of November, 1980.

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